

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP410

Cir. Ct. No. 2016CV59

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RREF II BHB-WI SKI, LLC,

PLAINTIFF-COUNTERCLAIM-DEFENDANT,

V.

**S & K, INC., F/K/A SINGH RESTAURANT OPERATIONS, INC. AND
SURINDER S. MANAK,**

**DEFENDANTS-CROSS-CLAIM
DEFENDANTS-APPELLANTS,**

U.S. VENTURE, INC., F/K/A U.S. OIL CO., INC.,

**DEFENDANT-COUNTERCLAIM-CROSS-CLAIM
PLAINTIFF-RESPONDENT,**

**PARMINDER MANAK, CHUPHENG, INC., RELIABLE WATER SERVICES,
LLC, STATE OF WISCONSIN - DEPARTMENT OF REVENUE AND
UNKNOWN TENANTS,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. S & K, Inc., f/k/a Singh Restaurant Operations, Inc. (“S & K”), and its principal, Surinder Manak, appeal a joint and several money judgment against them and in favor of U.S. Venture, Inc. f/k/a U.S. Oil Co., Inc. (“U.S. Venture”), in the amount of \$92,866.55. The circuit court granted summary judgment on U.S. Venture’s claims against S & K for breach of a retail supply agreement guaranteeing the annual purchase of a minimum amount of fuel, and against Manak for breach of a personal guaranty for all amounts due under that agreement. We reject S & K and Manak’s argument that U.S. Venture’s agreement was with a business entity distinct from S & K, as well as its argument that a genuine issue of material fact remained as to the amount of contractual damages to which U.S. Venture was entitled. We therefore affirm.

BACKGROUND

¶2 Singh Restaurant Operations, Inc. (“SRO”) was formed as a Minnesota corporation in 1991. Based on Wisconsin Department of Financial Institutions (the “Department”) records, it appears SRO became qualified to conduct business operations in Wisconsin in 2007. In 2009, SRO submitted to the Department a plan of conversion in accordance with WIS. STAT. § 180.1161

(2015-16).¹ SRO sought to convert to a Wisconsin corporation under the name “S & K, Inc.” SRO represented that it was a “multi unit operation” that consisted of a convenience store and gas station known as “Super Truck Stop” and a Super 8 franchised motel located in Baldwin, Wisconsin. Manak was identified as S & K’s registered agent. The Department approved the plan and issued a certificate of conversion on November 30, 2009. The gas station closed in mid-2014.

¶3 In 2016, RREF II BHB-WI SKI, LLC (“RREF”) commenced this action to foreclose upon the S & K property in Baldwin.² U.S. Venture was named as a defendant on the basis that it was a junior lienholder by virtue of a “Real Estate Security Agreement” recorded on the property in 2007. U.S. Venture filed a cross-claim against S & K and Manak asserting that S & K’s predecessor-in-interest, SRO, under the name “Super Truck,” had breached a ten-year retail supply agreement under which Super Truck was to buy minimum amounts of fuel annually from U.S. Venture. According to U.S. Venture, Manak had personally guaranteed amounts payable under the retail supply agreement, and U.S. Venture had obtained a security interest in the real estate and a purchase-money security interest in the equipment at the Baldwin location, which included four gasoline pumps and six diesel fuel pumps. U.S. Venture also filed a counterclaim against

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² There is no dispute in this appeal as to the merits of RREF’s foreclosure claims, which were based on S & K’s default of a business note, default of a commercial security agreement, and breach of Manak’s and another party’s personal guaranties. During the litigation, S & K, as well as Manak and the other RREF note guarantor, entered into a stipulation with RREF that they would not oppose RREF’s action seeking foreclosure of the mortgaged premises in exchange for the release of all claims against the personal guarantors.

RREF, alleging RREF had wrongfully removed the fuel pumps from the location and refused to deliver them to U.S. Venture. U.S. Venture estimated the retail replacement value of the pumps to be approximately \$94,000. It sought a joint and several money judgment against S & K, Manak, and RREF in the amount of \$92,866.55, plus per diem interest, attorneys' fees and costs.

¶4 U.S. Venture filed a motion for summary judgment on its breach of contract and guaranty claims against S & K and Manak, respectively, and on its conversion claim against RREF. RREF conceded that it had removed underground storage tanks and fuel pumps in November 2015 in consultation with the Wisconsin Department of Natural Resources, but it maintained there was a genuine issue of material fact regarding the priority of U.S. Venture's lien interest. S & K did not file a formal brief or evidentiary materials in opposition to U.S. Venture's summary judgment motion, but it suggested by letter that S & K was a different business entity than SRO and, therefore, could not be liable for the breach of the retail supply agreement with U.S. Venture.

¶5 Various motions, including U.S. Venture's summary judgment motion, came before the circuit court for a hearing. S & K's attorney, who was also representing Manak, conceded he had not "submit[ted] any opposing submissions." He believed such submissions were unnecessary because he contended U.S. Venture had failed to make a prima facie case for summary judgment in the first instance, based on the separate nature of the entities. S & K and Manak argued SRO's conversion to a Wisconsin company was unsuccessful, and therefore the two companies were "separate" and S & K could not be liable for SRO's debts. S & K and Manak also asserted that any judgment against them should be joint and several with RREF if the court determined RREF had

wrongfully converted property, because the value of the fuel pumps should be applied to reduce the amounts they owed to U.S. Venture.

¶6 U.S. Venture, in response, argued that it did not matter whether the conversion was effective, because SRO and S & K were in fact the same entity:

[Y]ou can't defectively attempt to convert and absolve yourself of liability on both ends. In fact, the statute in Minnesota and Wisconsin is quite clear that the converted corporation is the same entity and it has the same liability.

So, we're dealing with semantics and procedure and names. We're not dealing with separate substantive [entities]. It's only one entity and it tries to move. Maybe it doesn't do it correctly, but the judgment should be against that entity. That's why it should be Singh Restaurant Operations, also known as S & K.

U.S. Venture took no position on the joint and several nature of the judgment at the hearing.

¶7 In a written order, the circuit court concluded U.S. Venture had a perfected purchase-money security interest in the fuel pumps, which had priority over RREF's mortgage. It rejected S & K's assertion "that the corporate entity identified is not liable." Summary judgment was granted with respect to U.S. Venture's cross-claims against S & K and Manak for breach of contract and its counterclaim against RREF for conversion of its collateral. The court stated it would "reserve[] a decision on RREF's motion for summary judgment" and hold a hearing for a "final accounting of damages" related to U.S. Venture's collateral, as it appeared U.S. Venture had repurchased the fuel pumps at auction.

¶8 The circuit court then entered two judgments in U.S. Venture's favor. The first was a joint and several \$92,866.55 money judgment against S & K and Manak for breach of contract. The second was a judgment on liability

only against RREF for U.S. Venture’s counterclaim for conversion. The court stated a final judgment would be entered between RREF and U.S. Venture “after the court hears evidence with respect to damages pursuant to [WIS. STAT. § 895.446(3)(a)-(c)].” S & K and Manak now appeal.

DISCUSSION

¶9 We review a grant of summary judgment de novo. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 651, 476 N.W.2d 593 (Ct. App. 1991). Summary judgment is appropriate if the record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Whether summary judgment is appropriate is a question of law. *Fortier*, 164 Wis. 2d at 651-52. The summary judgment methodology is well-established and we need not restate it here. *See Tews v. NHI, LLC*, 2010 WI 137, ¶4, 330 Wis. 2d 389, 793 N.W.2d 860.

¶10 S & K and Manak first argue that, as a matter of law, S & K is not liable for the debts of SRO. They maintain, without citation to anything in the appellate record, that S & K “is a separate entity from SRO,” and U.S. Venture’s contract was only with the latter. Although S & K and Manak acknowledge that Manak attempted to convert SRO into a Wisconsin corporation named S & K, they contend “[t]here is ... no question that he was unsuccessful in completing the paperwork and being granted the approvals necessary to convert SRO into S & K.”

¶11 In response, U.S. Venture directs us to its evidentiary submissions, which went un rebutted when S & K and Manak failed to file materials in response to U.S. Venture’s summary judgment motion. These materials show, among other things, that S & K was issued a certificate of conversion from the Department on November 30, 2009, for a Minnesota corporation formerly known as Singh

Restaurant Operations, Inc. S & K and Manak have not provided any legal citation or argued what else might have needed to occur under Wisconsin or Minnesota law to make the conversion “successful.” That failing aside, there is absolutely no record evidence showing S & K and SRO were two different entities, as S & K and Manak contend. For two separate corporations there would be, at a minimum, two different articles of incorporation. Given the undisputed record evidence before us, we conclude the circuit court properly rejected the argument that S & K and SRO are different and separate legal entities.

¶12 Next, S & K and Manak contend the circuit court erred by entering judgment against them in the amount of \$92,866.55. S & K and Manak primarily rely on the court’s statement at the hearing that it would have to hold further proceedings for a “final accounting of damages” on U.S. Venture’s counterclaim for conversion against RREF. They assert that, if the retail value of the fuel pumps is approximately \$94,000, and U.S. Venture recovered even a portion of that amount from RREF, the amount of the judgment against S & K and Manak could be significantly reduced.

¶13 S & K and Manak’s arguments both confuse the claims at issue and assume the existence of a claim they did not make. The damages recoverable for civil conversion are specified by statute, WIS. STAT. § 895.446(3)(a)-(c), and compensatory damages are limited to the actual damages incurred by the plaintiff, including the retail or replacement value of the equipment. The circuit court recognized that additional proceedings were necessary to determine the amount of damages on the civil conversion claim given that U.S. Venture had apparently repurchased its fuel equipment at auction for significantly less than \$94,000.

¶14 Conversely, U.S. Venture’s claims against S & K and Manak were based on a breach of the retail supply agreement and personal guaranty, respectively. The circuit court apparently determined the contractual damages U.S. Venture incurred were a sum certain in the amount of U.S. Venture’s request—reasonably so, given that S & K and Manak undertook no substantive defense of the claims against them other than advancing their “separate entities” theory. There were no arguments or evidentiary submissions suggesting the contract damages were less than the amount claimed.

¶15 Although S & K and Manak assert they are entitled to a setoff, there is no offsetting liability on U.S. Venture’s part that would reduce the amount of its judgment against S & K and Manak. See *Bunde v. Badger Carpet Dyers, Inc.*, 262 Wis. 621, 624, 55 N.W.2d 869 (1952).³ Moreover, the claims against S & K and Manak on the one hand, and RREF on the other, were different. As U.S. Venture observes, the value of the property RREF converted did not affect the amount of S & K’s liability under the retail supply agreement. Any argument that U.S. Venture has received a double recovery is undeveloped and premature. To the extent S & K and Manak attempt to argue they have paid more than their fair share, their recourse was against RREF. This court will not entertain such a claim for the first time on appeal.

³ Although S & K and Manak’s reply brief suggests it might be entitled to equitable setoff in the circuit court’s discretion “whenever justice requires it,” logic dictates there can be no proper exercise of discretion for such a setoff if no mutual obligations exist.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

